

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 W. SCOTT HARKONEN, M.D.,

12 Plaintiff,

No. C 13-0071 PJH

13 v.

14 KATHLEEN SEBELIUS, Secretary,
15 Department of Health and Human
Services,

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

16 Defendant.
17 _____ /

18 The parties' cross-motions for summary judgment came on for hearing before this
19 court on September 11, 2013. Plaintiff appeared by his counsel Mark E. Haddad, and
20 defendant appeared by Assistant United States Attorney Erica Hitchings. Having read the
21 parties' papers and carefully considered their arguments and the relevant legal authority,
22 the court hereby GRANTS defendant's motion and DENIES plaintiff's motion.

23 **INTRODUCTION**

24 This is a case brought under 42 U.S.C. § 1320a-7(f) and 42 U.S.C. § 405(g),
25 seeking review of a decision by the Secretary of the U.S. Department of Health and Human
26 Services ("the Secretary" or "HHS") to exclude plaintiff W. Scott Harkonen, M.D. from
27 participation in federal health care programs for five years.

28 Dr. Harkonen was formerly the Chief Executive Officer of a company that developed,

1 marketed and sold a drug known as Actimmune. On March 18, 2008, a grand jury returned
2 an indictment alleging that Dr. Harkonen had knowingly and intentionally devised a scheme
3 to defraud that included the issuance of a press release containing false statements
4 regarding a clinical study of Actimmune, and charging him with two felony counts – wire
5 fraud and felony misbranding.

6 Following the trial, the jury returned a verdict on September 29, 2009, finding Dr.
7 Harkonen guilty of wire fraud, but acquitting him of felony misbranding. See United States
8 v. Harkonen, No. CR 08-0164 MHP (N.D. Cal.). On December 4, 2009, Dr. Harkonen filed
9 a motion to dismiss the indictment, a motion for judgment of acquittal, and a motion for a
10 new trial. On July 27, 2010, the court issued an order denying the post-trial motions in full.
11 See United States v. Harkonen, 2010 WL 2985257 (N.D. Cal. July 27, 2010).

12 On November 10, 2010, Dr. Harkonen requested leave to file a motion for
13 reconsideration of the order denying the post-trial motions. On January 7, 2011, Dr.
14 Harkonen filed a motion for a new trial based on alleged Brady violations, and for
15 production of additional Brady evidence. On February 14, 2011, Dr. Harkonen filed another
16 motion for a new trial, based on “newly discovered evidence” contained in an amicus brief
17 relating to the role of statistical evidence in evaluating clinical data, filed by the United
18 States in a case pending before the U.S. Supreme Court.

19 Sentencing finally went forward on April 13, 2011. Although the prosecution had
20 requested a stiffer sentence, Dr. Harkonen was sentenced to three years’ probation, six
21 months’ home detention, 200 hours of community service, a \$20,000 fine, and a \$100.00
22 special assessment. Judgment was entered on April 18, 2011 (with an amended judgment
23 to correct clerical errors entered on May 26, 2011).

24 Also on April 18, 2011, the court issued an order denying the two pending motions
25 for a new trial. Dr. Harkonen filed a notice of appeal with the Ninth Circuit on April 25, 2011
26 (amended notice of appeal filed June 7, 2011), seeking review of the conviction and
27 judgment, the ruling on one of the Secretary’s motions in limine, the rulings on the post-trial
28 motions, “and all other adverse orders.” On May 12, 2011, the Secretary filed a notice of

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1 appeal of the sentence.

2 On August 31, 2011, the Office of the Inspector General (“OIG”) of HHS notified Dr.
3 Harkonen that, due to his felony conviction for wire fraud, he was being excluded from
4 federal health care programs pursuant to Section 1128(a)(3) of the Social Security Act, 42
5 U.S.C. § 1320a-7(a)(3), for a period of five years, effective September 20, 2011.

6 Under § 1128(a) of the Social Security Act, the Secretary is required to exclude from
7 participation in all Federal health care programs any individual or entity convicted of certain
8 types of criminal offenses, listed in four subdivisions of the statute. See 42 U.S.C.
9 § 1320a-7(a)(1)-(4). Of relevance to the present action, subsection (a)(3) provides that the
10 Secretary “shall exclude the following . . . from participation in any Federal health care
11 program” –

12 Any individual or entity that has been convicted for an offense which occurred
13 after August 21, 1996, under Federal or State law, in connection with the
14 delivery of a health care item or service . . . consisting of a felony relating to
fraud, theft, embezzlement, breach of fiduciary responsibility, or other
financial misconduct.

15 42 U.S.C. § 1320a-7(a)(3) (emphasis added). Neither the statute nor the implementing
16 regulations provide a definition for “in connection with” or “delivery of.”

17 On October 28, 2011, Dr. Harkonen requested administrative review of the OIG’s
18 notice of exclusion. On May 14, 2012, an Administrative Law Judge (“ALJ”) in the Civil
19 Remedies Division of HHS’ Departmental Appeals Board issued a decision affirming the
20 OIG’s exclusion order. Dr. Harkonen appealed the ALJ’s decision to the Appellate Division
21 of the Departmental Appeals Board (“DAB”), which affirmed the ALJ’s order on November
22 9, 2012.

23 Dr. Harkonen filed this action on January 7, 2013, against Kathleen Sebelius,
24 Secretary of HHS, and Daniel R. Levinson, Inspector General of HHS, seeking review of
25 the final exclusion order pursuant to § 1128(f) of the Social Security Act, and 42 U.S.C.
26 § 405(g), and also seeking declaratory and injunctive relief. Mr. Levinson was
27 subsequently dismissed from the case pursuant to stipulation.

28 On March 12, 2013, the Ninth Circuit issued an unpublished memorandum affirming

1 Dr. Harkonen's conviction and sentence. See United States v. Harkonen, No. 11-10209,
2 510 Fed. Appx. 633, 2013 WL 782354 (9th Cir. March 4, 2013) (unpublished decision). Dr.
3 Harkonen sought en banc review; that petition was denied on May 7, 2013. The mandate
4 issued on May 20, 2013. On August 5, 2013, Dr. Harkonen filed a petition with the U.S.
5 Supreme Court seeking a writ of certiorari.

6 BACKGROUND

7 Dr. Harkonen served as the CEO of InterMune, Inc. ("InterMune") from February
8 1998 through June 30, 2003 and was a member of its Board of Directors from February
9 1998 through September 2003. InterMune developed, marketed and sold drugs, including
10 a drug sold under the brand name Actimmune. Actimmune was approved by the U.S. Food
11 and Drug Administration ("FDA") to treat two rare disorders that primarily affect children,
12 chronic granulomatous disease and severe, malignant osteopetrosis. It was not approved
13 by the FDA to treat idiopathic pulmonary fibrosis (IPF), a fatal lung disease that mainly
14 affects middle-aged people.

15 In October 2000, InterMune began a Phase III clinical trial – the GIPF-001 trial – to
16 determine whether treating IPF patients with Actimmune was effective. By August 2002,
17 the data from that clinical trial had failed to show that Actimmune was effective in treating
18 IPF. Dr. Harkonen discussed the results of the trial with his staff at InterMune and directed
19 them to conduct additional analyses on subgroups of patients. This analysis suggested a
20 survival trend for patients whose IPF was described by InterMune as "mild to moderate."

21 On August 27, 2002, Dr. Harkonen and other InterMune employees spoke with the
22 FDA about the results of the GIPF-001 Phase III trial and additional subgroup analyses of
23 patient deaths. The FDA medical reviewer staff advised Dr. Harkonen that the trial data
24 were not sufficient to gain FDA approval for Actimmune to treat IPF and that further clinical
25 testing would be required to determine whether Actimmune could delay death for IPF
26 patients.

27 Nevertheless, on August 28, 2002, InterMune issued a press release announcing
28 the results of the GIPF-001 Phase III clinical trial ("the Press Release"). The headline

1 stated, "InterMune Announces Phase III Data Demonstrating Survival Benefit of Actimmune
2 in IPF," with the subheading "Reduces Mortality by 70% in Patients With Mild to Moderate
3 Disease." Administrative Record ("AR") 515. Dr. Harkonen wrote the headline and
4 subheading and controlled the content of the entire Press Release; and also caused the
5 Press Release to be posted on InterMune's website and to be sent to a wire service for
6 release to news outlets nationwide.

7 Among other things, the Press Release stated that InterMune had announced that
8 preliminary data from its Phase III clinical trial of Actimmune® (Interferon
9 gamma-1b) injection for the treatment of idiopathic pulmonary fibrosis (IPF), a
10 debilitating and usually fatal disease for which there are no effective treatment
11 options, demonstrate a significant survival benefit in patients with mild to
moderate disease randomly assigned to Actimmune versus control treatment
($p = 0.004$). . . .

12 Importantly, Actimmune also demonstrated a strong positive trend in
increased survival in the overall patient population, and a statistically
13 significant survival benefit in patients with mild to moderate IPF. . . .

14 AR 515, 516.

15 In March 2008, Dr. Harkonen was indicted for wire fraud in violation of 18 U.S.C.
16 § 1343, and felony misbranding of a drug in violation of 21 U.S.C. §§ 331(k), 333(a)(2), and
17 352(a). AR 501-513. Both counts were based on the same set of facts and allegations,
18 which included a detailed recitation of Dr. Harkonen's and InterMune's marketing strategy,
19 and Dr. Harkonen's fraudulent scheme to induce doctors to prescribe, and patients to take,
20 Actimmune to treat IPF.

21 While the indictment did not allege that the data were falsely reported, it did
challenge the interpretation and presentation of the data in the study, specifically asserting
23 that the Press Release "contained materially false and misleading information regarding
24 Actimmune and falsely portrayed the results of a GIPF-001 Phase III trial as establishing
25 that Actimmune reduces mortality in patients with IPF." AR 509.

26 On September 29, 2009, the jury convicted Dr. Harkonen of wire fraud and
27 acquitted him of felony misbranding. The district court and Ninth Circuit opinions describe
28 the evidence supporting the jury's finding that Dr. Harkonen knowingly participated in a

1 scheme to defraud, as charged. See Harkonen, 2010 WL 2985257 at *14 (“sufficient
2 evidence for the jury to find beyond a reasonable doubt that Harkonen acted with the intent
3 to defraud”); Harkonen, 2013 WL 782354 at *1-2 (jury justified in finding specific intent to
4 defraud). The district court also noted evidence of “extensive, coordinated efforts by
5 InterMune to disseminate the Press Release to doctors and patients,” AR 362, as well as to
6 pharmacies, AR 358 (April 18, 2011 order denying motions for a new trial); see also
7 Harkonen, 2013 WL 782354 at *3.

8 Other evidence presented at trial indicated that Dr. Harkonen had a motivation to
9 commit fraud, since he and InterMune stood to benefit financially if Actimmune sales
10 increased, AR 387; see also Harkonen, 2013 WL 782354 at *2 (discussing Dr. Harkonen’s
11 financial motivation to find a positive result in the face of GIPF-001’s failure); and evidence
12 that Dr. Harkonen prevented individuals at InterMune – include some knowledgeable
13 regarding the data – from reviewing the Press Release before it was issued, AR 387-88;
14 see also Harkonen, 2013 WL 782354 at *1. Both the district court and the Ninth Circuit
15 upheld the jury’s finding of materiality, holding that the Press Release had the capacity to
16 influence the targeted audience of doctors and patients, AR 362; Harkonen, 2013 WL
17 782354 at *3 (evidence that Press Release was capable of misleading some addressees).

18 On August 31, 2011, the Secretary (through the OIG) notified Dr. Harkonen that he
19 was being excluded from federal health care programs pursuant to § 1128(a)(3) of the
20 Social Security Act for a period of five years based on the wire-fraud conviction. Dr.
21 Harkonen requested administrative review on October 28, 2011, arguing that his conviction
22 did not trigger a mandatory exclusion because his offense was not “in connection with the
23 delivery of a health care item or service” and was not based on any act or omission in a
24 health care program.

25 The ALJ affirmed the exclusion order on May 14, 2012, finding that § 1128(a)(3) did
26 not require proof that “any prescriptions for Actimmune were actually written, that the
27 treatment was actually used, or that there was some actual effect upon the delivery of a
28 health care item or service.” AR 6. Instead, the ALJ held that it was sufficient “that there

1 be a nexus or common sense connection between the offense and the delivery of a health
2 care item or service." AR 6 (citing Erik D. DeSimone, R.Ph., DAB No. 1932, 2004 WL
3 1764746 (H.H.S. July 20, 2004)).

4 The ALJ also found no requirement under § 1128(a)(3) that there be proof that the
5 defendant intended to cause, or did cause, an effect upon the delivery of a health care item
6 or service. AR at 7. He noted that the standard in the matter before him was
7 preponderance of the evidence, and stated that he had "no trouble concluding based on the
8 language of the press release that the intent of the release and [Dr. Harkonen's]
9 statements therein were to increase the sales of Actimmune." AR at 7. Dr. Harkonen
10 appealed the ALJ's decision to the DAB, which, on November 9, 2012, affirmed the ALJ's
11 order based on the same reasoning. AR 10-30.

12 The DAB addressed each of Dr. Harkonen's arguments in turn, explaining, with
13 citations to the record, why the exclusion was fully supported by both the jury's findings and
14 the district court's findings at sentencing. First, consistent with the plain language and
15 purpose of the statute, the DAB read "the word 'delivery' together with the key modifying
16 language in the phrase, 'in connection with,' to require a 'common sense connection' or
17 'nexus' between the underlying facts and circumstances of the offense and the delivery of
18 health care items or services to individuals for their health care needs." AR 16.

19 Apart from this, the DAB found that § 1128(a)(3) "does not require proof of an actual
20 impact or effect on the delivery of a health care item or service" – and that, in this case,
21 there was no need for proof that the false or fraudulent statements in the August 28, 2002
22 Press Release caused a particular prescription of Actimmune. AR 19. The DAB further
23 explained that, when reviewing an exclusion, the ALJ is to consider not only the "evidence
24 of the conviction," but also the "circumstances underlying the offense." Id.

25 The DAB found that the "ALJ reasonably determined that the language used in the
26 press release itself showed that the intent of the release and [Dr. Harkonen's] statements
27 therein were to increase the sale of Actimmune and thereby have an impact on delivery of
28 the drug" and "that the claims in the press release had the potential to encourage patients

1 to seek, and doctors to prescribe, Actimmune." AR 21 (quotations omitted). The DAB also
2 noted that "even absent any intent by [Dr. Harkonen], the press release's claims about the
3 drug could reasonably be viewed . . . as part of the delivery process." AR 21.

4 Finally, the DAB concluded that Dr. Harkonen's exclusion "comports with the
5 remedial purpose" of the exclusion statute because "the evidence relating to the crime for
6 which he was convicted . . . shows that [he] was untrustworthy in representations he made
7 or caused to be made about the efficacy of a health care item tested, marketed and sold by
8 the pharmaceutical company of which he was the Chief Executive Officer." AR 31.

9 Having engaged in a detailed review of the Press Release, the March 2002
10 indictment, the jury instructions and verdict, and the district court's memoranda addressing
11 the post-trial motions, the DAB concluded that substantial evidence in the record as a
12 whole supported a finding that Dr. Harkonen's wire fraud conviction was in connection with
13 the delivery of a health care item or service. AR 20-26. The DAB's decision represents the
14 Secretary's final decision. See 42 C.F.R. § 1005.21(j).

15 Dr. Harkonen brought this action to challenge the Secretary's decision, alleging in
16 the first and second causes of action that the Secretary's decision is contrary to law, is
17 arbitrary and capricious, and is not based upon substantial evidence; and in the third,
18 fourth, and fifth causes of action that the exclusion violates his rights under the Fifth and
19 Eighth Amendments of the U.S. Constitution.¹ See Cplt ¶¶ 58-75. The parties have
20 submitted the matter for summary judgment based on the administrative record.

21 The basic dispute between the parties is whether the wire fraud for which Dr.
22 Harkonen was convicted was perpetrated "in connection with the delivery of a healthcare
23 item or service."

24 STANDARD OF REVIEW

25 Under § 1128(f) of the Social Security Act (providing for notice, hearing, and judicial
26 review with regard to Secretary's decision to exclude individual from participation), and 42

27 _____
28 ¹ These constitutional claims were not adjudicated in the proceeding before the ALJ,
as the ALJ does not have the authority to grant relief on claims of constitutional violations.

1 U.S.C. § 405(g), (h) (judicial review and finality of decision by Commissioner of Social
2 Security), the district court has the power to review and reverse the Secretary's exclusion
3 decisions. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001).

4 Review pursuant to § 405(g) is "highly deferential," Valentine v. Commissioner
5 Social Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009), requiring affirmance of the
6 Secretary's decision so long as the record as a whole contains substantial evidence to
7 support the Secretary's findings of fact, and so long as the Secretary applied the correct
8 legal standard. 42 U.S.C. § 405(g); see also Matney v. Sullivan, 981 F.2d 1016, 1019 (9th
9 Cir. 1992).

10 "Substantial evidence" means "more than a mere scintilla, but less than a
11 preponderance." Valentine, 574 F.3d at 690 (citation omitted); see also Travers v. Shalala,
12 20 F.3d 993, 996 (9th Cir. 1994). On factual issues, the Secretary bears the burden of
13 proof in establishing the basis for an exclusion. 42 C.F.R. § 1001.15(b). To be supported
14 by "substantial evidence," the agency's decision requires "such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion;" it may not be affirmed
16 "simply by isolating a specific quantum of supporting evidence." Hill v. Astrue, 698 F.3d
17 1153, 1159 (9th Cir. 2012) (quotation omitted).

18 When evaluating the Secretary's interpretation of 42 U.S.C. § 1320a-7, courts
19 routinely apply the principles laid out in Chevron U.S.A., Inc. v. Natural Resources Defense
20 Council, Inc., 467 U.S. 837 (1984). A two-step review procedure is used in such situations.
21 First, the court begins with the statute's "language itself [and] the specific context in which
22 that language is used." Resisting Envtl. Destruction on Indigenous Lands, REDOIL v. U.S.
23 Envtl. Prot. Agency, 716 F.3d 1155, 1161 (9th Cir. 2013) (quoting McNeill v. United States,
24 131 S.Ct. 2218, 2221 (2011)). That is, the court should apply "the ordinary tools of
25 statutory construction" to determine whether congressional intent is clear and the agency's
26 interpretation "is based on a permissible construction of the statute." City of Arlington, Tex.
27 v. F.C.C., 133 S.Ct. 1863, 1868 (2013). If the expressed intent of Congress is clear, then
28 the court and the agency must give effect to that unambiguously expressed intent.

¹ | REDOIL, 716 F.3d at 1161 (citing Chevron, 467 U.S. at 842-43).

If, however, Congress has not directly addressed the precise question at issue, the court must not simply impose its construction on the statute, as it would in the absence of an administrative interpretation, but rather ask “whether the agency’s answer is based on a permissible construction of the statute.” Id. (quoting Chevron, 467 U.S. at 843). If the Secretary’s construction is “rational and consistent with the statute,’ it is a permissible construction” and will be upheld. Zinman v. Shalala, 67 F.3d 841, 845 (9th Cir. 1995) (quoting N.L.R.B. v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987)); see also Haro v. Sebelius, __ F.3d __, 2013 WL 4734032 at *12 (9th Cir. Sept. 4, 2013). The court defers to the Secretary’s reasonable interpretation of a statute she administers. See, e.g., Friedman v. Sebelius, 686 F.3d 813, 818 (D.C. Cir. 2012).

THE CROSS-MOTIONS

13 || A. Legal Standard

14 Summary judgment is appropriate “if the movant shows that there is no genuine
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
16 Fed. R. Civ. P. 56(a). The judicial review standard set forth in 42 U.S.C. § 405(g) is
17 expressly incorporated in 42 U.S.C. § 1320a-7(f), the statute under which Dr. Harkonen
18 seeks review.

19 || B. The Cross-Motions

20 Dr. Harkonen seeks summary judgment that the final agency decision excluding him
21 from participation in federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(3) is
22 contrary to law, arbitrary and capricious, and unsupported by substantial evidence; and/or
23 that his exclusion violates his rights under the Fifth and Eighth Amendments to the United
24 States Constitution. The Secretary seeks summary judgment that the decision to exclude
25 Dr. Harkonen from federal health care programs was based on application of the correct
26 legal standard and is supported by substantial evidence on the record as a whole; and that
27 the decision is in accord with the Fifth and Eighth Amendments.

28 The court finds that the Secretary's decision must be affirmed. The record as a

whole contains substantial evidence to support the Secretary's findings of fact, and the Secretary's construction of the statute is reasonable. Dr. Harkonen has not shown that the exclusion was based on an erroneous or impermissible interpretation of the statute.

1. Whether the Secretary applied the correct legal standard and whether the decision is supported by substantial evidence

The primary dispute between the parties is whether Dr. Harkonen was convicted of a crime committed "in connection with the delivery of a health care item or service." In evaluating the Secretary's interpretation of § 1128(a)(3), the court first employs "traditional tools of statutory construction," City of Arlington, 133 S.Ct at 1863, beginning with the text and structure of the statute, and "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985).

In this case, the text and structure of § 1128(a)(3) provide a clear indication that Congress intended to mandate a five-year-minimum exclusion for anyone convicted of a felony relating to one of the enumerated offenses. See 42 U.S.C.A. § 1320-7(a)(3); see also Travers, 20 F.3d at 998 ("[t]he Secretary shall exclude" in § 1128(a) is mandatory not discretionary; where the OIG finds that a conviction falls within the category of offense listed in the statute, the Secretary has "no choice but to impose the mandatory 5-year exclusion").

What is not entirely clear from the face of the statute is how to determine whether a felony was committed "in connection with the delivery of" a health care item or service. Where the court is faced with an ambiguous statutory term, Chevron requires that the court defer to the construction given the term by the agency charged with the statute's administration, provided the interpretation is a permissible construction of the statute. Donchev v. Mukasey, 553 F.3d 1206, 1216 (9th Cir. 2009).

Where, as here, a word or phrase is not defined by statute, the court normally construes it "in accord with its ordinary or natural meaning." Smith v. United States, 508 U.S. 223, 228 (1993) (citation omitted). The word "delivery" is used to refer to formal acts

1 of transferring or conveying, as in the “delivery” of deeds or title to real property. See, e.g.,
2 Black’s Law Dictionary (7th ed. 1999) at 440. However, “delivery” has also acquired a
3 more informal meaning of “providing.” See Bryan A. Garner, A Dictionary of Modern Legal
4 Usage (Oxford, 2d ed. 1995), at 263. “Provision” (or “providing”) refers generally to the “act
5 of supplying,” or “furnishing” or “purveyance.” See William C. Burton, Burton’s Legal
6 Thesaurus (Macmillan, 3d ed. 1998) at 437.

7 In addition, the phrases “in connection with,” “in relation to,” or “related to” are
8 generally interpreted expansively. See Metropolitan Life Ins. Co. v. Massachusetts, 471
9 U.S. 724, 739 (1985) (“relate to” has a “broad common-sense meaning” and a statutory
10 provision containing the phrase therefore has “broad scope”); see also Morales v. Trans
11 World Airlines, Inc., 504 U.S. 374, 383 (1992); United States v. Loney, 219 F.3d 281, 283-
12 84 (3d Cir. 2000).

13 In affirming the ALJ’s decision, the DAB read the word “delivery” together with the
14 phrase “in connection with” to require a “common sense connection” or “nexus” between
15 the underlying facts and circumstances of the offense and the delivery of health care items
16 or services to individuals for their health care needs. See AR 16. This interpretation has
17 been applied by the DAB in numerous decisions. See, e.g., Ellen L. Morand, DAB No.
18 2436, at 9, 2012 WL 369634 (H.H.S. Jan. 17, 2012) (theft of money from pharmacy by
19 pharmacy employee); Charice D. Curtis, DAB No. 2430, at 5, 2011 WL 7444589 (H.H.S.
20 Dec. 21, 2011) (theft of money from employer by in-home nursing services administrator);
21 Kenneth M. Behr, DAB No. 1997 at n.5, 2005 WL 2835001 (H.H.S. Sept. 28, 2005)
22 (attempted embezzlement by theft of drugs by pharmacist); DeSimone, 2004 WL 1764746
23 (theft of controlled substance by pharmacist from employer for his own use).

24 The same interpretation has also been approved by federal courts reviewing
25 exclusion decisions. See, e.g., Friedman v. Sibelius, 755 F.Supp. 2d 98, 108 (D.D.C.
26 2010) (“common sense connection” or “nexus” standard was consistent with ordinary
27 meaning of phrase “related to”), rev’d on other grounds, 686 F.3d 813, 820-23 (C.A.D.C.
28 2012); Ellicott v. Leavitt, 2008 WL 4809610 at *3 (S.D. Ga. Nov. 4, 2008); Quayum v. U.S.

1 Dept. of Health and Human Servs., 34 F.Supp. 2d 141, 143 (E.D.N.Y. 1998).

2 The Secretary asserts that a common sense nexus is present here because Dr.
3 Harkonen's wire fraud conviction was based on (among other things) the issuance of a
4 press release that misrepresented the effectiveness of a health care item (the prescription
5 drug Actimmune) with the intent of persuading doctors to prescribe, and patients to take,
6 Actimmune for IPF, and which was capable of influencing the decision of doctors to
7 prescribe, or patients to seek, prescriptions of Actimmune.

8 However, Dr. Harkonen takes issue with the Secretary's analysis, arguing that such
9 a standard is arbitrary and capricious, and leads to inconsistent results. He relies heavily
10 on the decision in Kabins v. Sibelius, 2012 WL 4498295 (D. Nev. Sept. 28, 2012), where
11 the court suggested that the Secretary's "common sense nexus" test is of questionable
12 utility because it is susceptible to discretionary and arbitrary enforcement.

13 Both the facts and procedural history of the Kabins case are distinguishable from the
14 facts and issues in this case. For example, the court in Kabins found that the petitioner had
15 at best a "minor role" in the offense, whereas here, it is undisputed that Dr. Harkonen was
16 the "controlling force" behind the Press Release.

17 It is true that the district court in Kabins reversed the determination of the Secretary
18 with regard to the plaintiff, Dr. Kabins, and did so based on a finding that the felony for
19 which Dr. Kabins had been connected was not committed "in connection with the delivery
20 of a health care product or service." However, Dr. Kabins pled guilty to misprision (failure
21 to report alleged crime of others) for helping cover up misdeeds of two attorneys, which led
22 the court to conclude that the offense was best viewed as being in connection with the
23 delivery of legal, not medical, services. See id., 2012 WL 4498295 at *2.

24 In the present case, by contrast, Dr. Harkonen was convicted of wire fraud in
25 connection with false statements regarding the clinical trials of a prescription drug, which
26 statements were likely to influence a person to part with money or property (to purchase
27 the drug). The Kabins court's comments regarding the "common sense nexus" test appear
28 in a footnote, and are dicta at best. See id. at *3 & n.1. Moreover, Dr. Harkonen's

1 exclusion is not contrary to the Kabins court's statement that an exclusion should not be
2 "premised on what is a remote relatedness to some health care delivery," id., 2012 WL
3 4498295 at *3, because in this case the connection is not "remote" – Dr. Harkonen issued a
4 false press release misrepresenting the efficacy of a prescription drug which was available
5 at that time for doctors to prescribe and patients to take.

6 Dr. Harkonen also asserts that the mandatory exclusion criteria cannot be satisfied
7 in this case because the underlying conviction was not based on "delivery" in the form of a
8 physician writing a prescription for Actimmune, and because there was no showing that
9 Actimmune was actually used by a patient as part of treatment for IPF. That is, he
10 contends that "in connection with the delivery of a health care item" can refer only to
11 conduct that occurs in the delivery process itself, and that where conduct – such as the
12 issuance of a press release – is not itself part of the delivery process, and there is no
13 showing that the conduct had a proximate impact on delivery because there was no direct
14 connection to the drug's distribution or sale in commerce, it is too remote or peripheral for
15 the mandatory exclusion to apply.

16 Dr. Harkonen's suggestion that the "delivery" of a drug only occurs at the point when
17 a prescription is filled and paid for, and that because his company merely "delivered" the
18 drug to a middleman (the distributor), he cannot be deemed to have participated in the
19 "delivery" of the drug or to have made any misrepresentation regarding the drug during its
20 "delivery," is contrary to the language and purpose of § 1128(a)(3), as shown by the
21 legislative history of the statute and the broadly-described felonies encompassed therein.
22 Moreover, it also departs from DAB precedent. See, e.g., Scott D. Augustine, DAB 2043,
23 2006 WL 2751080 (H.H.S. Sept. 14, 2006) (misrepresentation in connection with sale of
24 medical equipment to a distributor was part of process of delivery to medical facility or
25 patient, supporting exclusion under § 1128(a)(2)).

26 Courts have interpreted the phrases "in connection with" and "in relation to" as
27 encompassing the very type of "potential" effect that Dr. Harkonen contends is an
28 impermissible stretch of the statutory language. See, e.g., Smith, 508 U.S. at 238 (firearm

1 deemed to have been used “in relation to” a drug trafficking offense if it had “the potential
2 of facilitating” the offense); United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994)
3 (firearm deemed have been used or possessed “in connection with” a felony offense even if
4 the firearm only “potentially facilitated” or had “some potential emboldening role” in the
5 crime).

6 Dr. Harkonen asserts that the legislative history of § 1128 demonstrates that the
7 purpose of the statute is to protect Medicare, Medicaid, and other Federal programs and
8 their beneficiaries from financial misconduct and the provision of inadequate or improper
9 care – and that it was for this reason that Congress included the provisions allowing or
10 requiring excluding individuals and certain entities for certain conduct that it described in
11 the Senate Report as “related to the delivery of health care.” He suggests that because
12 “theft,” “embezzlement,” and “financial misconduct” are specifically listed in the statute and
13 necessarily occur in connection with a program’s “delivery” of items and services, it is those
14 types of actions which constitute offenses that if done in connection with Medicare or
15 Medicaid, would constitute stealing from the government, and which can support exclusion
16 under § 1128(a)(3).

17 Congress enacted the Health Insurance Portability and Accountability Act of 1996
18 (“HIPAA”), of which 42 U.S.C. § 1320-7(a)(3) is a part, “to combat waste, fraud, and abuse
19 in health insurance and health care delivery.” Pub.L. No. 104-191, 110 Stat. 1936, 1936
20 (1996). The legislative history regarding the statute as originally enacted indicates that it
21 was intended to protect federal programs from untrustworthy individuals and to “provide a
22 clear and strong deterrent against the commission of criminal acts.” S. Rep. 100-109, at 5
23 (1987), reprinted in 1987 U.S.C.C.A.N. 682, 686.

24 The court finds, however, that there is nothing in the language of § 1128(a)(3) or the
25 legislative history that requires that the conviction have been for an act equivalent to
26 “stealing from the government” – such as defrauding Medicare. Moreover, subsection
27 (a)(1) of the statute mandates a minimum five-year exclusion for anyone convicted of
28 “program-related crimes” – i.e., “a criminal offense related to the delivery of an item or

1 service” under Medicare or Medicaid. Thus, subsection (a)(3) must be directed at a
2 different type of conviction.

3 The offenses enumerated in subsection (a)(3) are felonies “relating to fraud, theft,
4 embezzlement, breach of fiduciary responsibility, or other financial misconduct.” Dr.
5 Harkonen’s interpretation would read out everything except theft and embezzlement, and
6 some aspects of “other financial misconduct.” The statute does not require that the “fraud”
7 be fraud perpetrated against the government – just that it be “fraud” and that it be “in
8 connection with the delivery of a health care item or service.”

9 The DAB’s decision affirming the ALJ is the product of formal adjudication that
10 merits Chevron deference. See Arizona Health Care Cost Containment Sys. v. McClellan,
11 508 F.3d 1243, 1249 (9th Cir. 2007). Prescription drugs are “health care items.” See 42
12 C.F.R. § 1001.101(b) (regulation interpreting subsection (a)(1) refers to health care item or
13 service as “any item or service to an individual to meet his or her physical, mental, or
14 emotional needs or well-being”).

15 The connection argued by the Secretary – that the issuance of a press release
16 containing false information about the efficacy of a prescription drug was designed to
17 encourage more sales of that drug, and can be considered fraud in the “delivery” of that
18 prescription drug in that it was issued in order to persuade doctors to prescribe, and
19 patients to seek, prescriptions for that drug – is a permissible interpretation and is not
20 unreasonable. Thus, under the Chevron standard, the court must defer to this reasonable
21 interpretation.

22 Dr. Harkonen also argues that the Secretary’s exclusion decision fails the
23 substantial evidence test, both because he was acquitted on the misbranding count, and
24 also based on the district court’s findings at sentencing. He contends that the wire fraud
25 count was for a “transmittal” to the general public that was not part of the drug’s distribution
26 (or “delivery”), and the jury was not required to find any actual or specifically intended
27 impact on sales. By contrast, in Dr. Harkonen’s view, the misbranding count – on which he
28 was acquitted – was expressly a charge of misrepresentations in connection with the

1 drug's sales.

2 That is, Dr. Harkonen claims that because he was acquitted on the charge that
3 would have involved a connection to the delivery of Actimmune (misbranding) and was
4 convicted of the charge that did not (wire fraud), there is no basis for concluding that his
5 "intent" in issuing the Press Release was to defraud physicians into prescribing, and
6 patients into purchasing, Actimmune. He argues that because there was no clear
7 connection between his conviction and the delivery of a prescription drug, the Secretary's
8 decision is arbitrary and capricious.

9 As an initial matter, the court finds that the DAB correctly concluded that Dr.
10 Harkonen's acquittal on the misbranding charge has no impact on the analysis in the
11 exclusion proceedings, which are based on a fraud conviction. The inquiry for the
12 misbranding count in the criminal case required a finding that Actimmune bore false or
13 misleading labeling. Such a finding is entirely different from the standard in the present civil
14 action. In particular, "labeling" is far more limited in its breadth than "in connection with."
15 See 21 U.S.C. § 321(m) (defining "labeling" as all labels or printed matter on any article or
16 its containers, or accompanying such article). Thus, a press release can be issued "in
17 connection with the delivery of a health care item or service" while at the same time not
18 qualifying as labeling – which is the case here.

19 Moreover, the underlying facts and circumstances of Dr. Harkonen's offense – as
20 set forth in the district court opinions, the Ninth Circuit opinion, and the DAB opinion –
21 show that the issuance of the press release was connected to the delivery of health care
22 items to individuals. As Dr. Harkonen concedes in his moving papers, "delivery" can also
23 mean "distribution or sale in commerce." Dr. Harkonen was the CEO of a business
24 dedicated to the development and manufacture of drugs for health care delivery. He
25 committed his crime as part of operating that business. The jury instructions, as well as the
26 guilty verdict on the wire fraud count, establish that Dr. Harkonen's conviction is "in
27 connection with the delivery of a health care item or service."

28 In returning a conviction on the wire fraud count, the jury necessarily found each of

1 the five elements of the crime proven beyond a reasonable doubt – that Dr. Harkonen had
2 “made up a scheme or plan to defraud by making false or fraudulent statements;” that Dr.
3 Harkonen knew that the statements in the August 28, 2002 Press Release were false or
4 fraudulent at the time they were made; that “the statements were material” – that is, that
5 “they had a natural tendency to influence, or were capable of influencing, a person to part
6 with money or property;” that Dr. Harkonen had “acted with the intent to defraud;” and that
7 Dr. Harkonen had “used, or caused to be used, the interstate wires to carry out or attempt
8 to carry out the scheme.” See AR 443.

9 The Press Release was designed to increase sales of a prescription drug that was
10 already in the stream of commerce. Thus, the sales of Actimmune and its use by patients
11 were part of the delivery process, and both were clearly referenced in the Press Release.
12 The fact that Dr. Harkonen’s conviction required a finding that the fraudulent statements or
13 omissions in the Press Release (or the Press Release as a whole) “had a natural tendency
14 to influence, or were capable of influencing, a person to part with money or property,” as
15 set forth in the wire fraud jury instruction, further illustrates the link between the conviction
16 and the commercial prescription drug market.

17 In denying Dr. Harkonen’s post-trial motions, the district court noted that the
18 prosecution had introduced evidence at trial not only that numerous statements in the
19 Press Release were false or fraudulent, but also that the Press Release “as a whole” was
20 false or fraudulent. Harkonen, 2010 WL 2985257 at *9.

21 Among other things, the court found that Dr. Harkonen was the “controlling force”
22 behind the content of the Press Release, and that there was sufficient evidence for the jury
23 to conclude beyond a reasonable doubt that multiple statements in the Press Release
24 (including the headline) were false or fraudulent. In particular, the Press Release
25 described the study as “a success,” but the overwhelming evidence at trial was that it was a
26 failure. The court also concluded that the basis of the jury’s finding of falsity could have
27 been the Press Release’s wording together with “omissions of critical information,”
28 especially given that there was no other independent source at the time from which

1 interested individuals could have verified the results. See AR 21-26; see also Harkonen,
2 2010 WL 2985257 at *9-12.

3 A fraud that occurs in the “chain of delivery” qualifies for exclusion. See, e.g.,
4 Augustine, 2006 WL 2751080. Here, the DAB legitimately concluded that the Press
5 Release’s claims about Actimmune “could reasonably be viewed by the ALJ as part of a
6 delivery process.” See AR 21. Moreover, Dr. Harkonen’s misrepresentation occurred
7 before, during, and after his company’s delivery of the health care item Actimmune, and in
8 addition was intended to, and likely did, impact the decisionmaking process of doctors and
9 patients as to whether to prescribe/take the drug. For this reason, Dr. Harkonen’s offense
10 occurred in the “chain of delivery of a health care item or service.”

11 The district court concluded that the scheme to defraud underlying the wire fraud
12 conviction encompassed the false promotion of Actimmune to physicians and patients, and
13 was not limited to the issuance of the Press Release, but included “extensive, coordinated
14 efforts by InterMune to disseminate the press release to doctors and patients.” See AR
15 358, 362; U.S. v. Harkonen, CR-08-0164 MHP (N.D. Cal.), Memorandum & Order re
16 Defendant’s Motions for a New Trial, unpub. decision, at 8, 12.

17 The district court found in its post-trial memorandum that the fact that a press
18 release is not the type of scientific data consulted by physicians in making treatment
19 decisions does not mean that the statements contained in the Press Release are not
20 material. The Ninth Circuit subsequently arrived at the same conclusion – that there was
21 sufficient evidence to support a finding that the statements (or omissions) in the Press
22 Release carried the capacity to affect treatment decisions. See AR 360, 362.

23 The district court also found that the Press Release had some influence on IPF
24 patients and/or their family members, as the court referred to letters from members of the
25 public, including one written by the son of an IPF patient, requesting that the VA prescribe
26 Actimmune for his father. Furthermore, the court concluded that the Press Release itself
27 was written in such a way as to tout its own significance. The district court characterized
28 Dr. Harkonen’s crime as involving the coordinated decisionmaking between doctors and

1 IPF patients to prescribe and take Actimmune, and found extensive evidence introduced at
2 trial from which the jury could infer the materiality of statements in the Press Release. See
3 AR 358, 362, 365.

4 Similarly, the DAB's found that the Press Release was part of and in connection with
5 the delivery process. The Press Release quoted Dr. Harkonen as saying that he believed
6 the results being reported "will support use of Actimmune and lead to peak sales in the
7 range of \$400-\$500 million per year." AR 515. The DAB found that Dr. Harkonen, as the
8 CEO of a business dedicated to developing and manufacturing drugs for health care
9 delivery, committed his crime in the context and under the cover of carrying out that
10 business, as the sale of a drug and its use by a patient are both necessary parts of the
11 delivery process and both were clearly referenced in the Press Release. See AR 21.

12 Dr. Harkonen's second principal contention is that the Secretary unjustifiably ignored
13 the district court's findings at sentencing – specifically the finding that there was no
14 evidence that Dr. Harkonen intended to cause any loss. In a related argument, he
15 contends that the government asked for, and the district court rejected, an enhancement
16 based not merely on actual loss, but also on intended loss (citing AR 464, 485-87; U.S. v.
17 Harkonen, 510 Fed. Appx. 633, 2013 WL 782354 at *4). He asserts that when the district
18 court rejected the proposed enhancement for intended loss as lacking any reasonable
19 basis, the court was applying essentially the same evidentiary standards that the ALJ was
20 required to apply in determining whether the Secretary had met her burden of
21 demonstrating a sufficient connection to the delivery of health care services.

22 The court finds, however, that the DAB reasonably concluded that nothing in the
23 sentencing proceeding conflicted with the finding that Dr. Harkonen's fraud conviction was
24 "in connection with the delivery of a health care item or service." The question at
25 sentencing was whether the government had met its burden with regard to the imposition of
26 a sentencing enhancement that was based on the amount of the loss caused by the
27 conduct underlying the conviction. See U.S.S.G. § 2B1.1, n.2(A)(i) (2001 rev.) – "[a]ctual
28 loss" means "reasonably foreseeable pecuniary harm that resulted from the offense"; id.

1 § 2B1.1, n.2(A)(ii) – “[i]ntended loss” means “pecuniary harm that was intended to result
2 from the offense.”

3 Thus, the court’s inquiry was whether “an amount of loss” caused (or intended to be
4 caused) by the Press Release could be determined with a sufficient degree of accuracy.
5 The court found that it was “unable to determine with a sufficient degree of accuracy that
6 . . . there is a loss as a result of the conduct reflected in the wire fraud count.” AR 464-65.
7 The fact that the district court was unable to determine that there was an amount of loss
8 caused by the Press Release does not constitute an affirmative finding that in committing
9 wire fraud, Dr. Harkonen did not intend to cause any loss, or did not intend to encourage
10 patients to use and doctors to prescribe Actimmune. Moreover, this conclusion is
11 bolstered by the court’s failure to apply a “mass marketing” enhancement during the same
12 hearing.

13 The court finds that substantial evidence in the record as a whole supports the
14 finding that Dr. Harkonen’s offense was in connection with the delivery of a health care item
15 or service. InterMune disseminated the Press Release to doctors, patients, and
16 pharmacies, and Dr. Harkonen’s “scheme to defraud” extended over a period of time and
17 entailed both the issuance of a Press Release containing false and misleading information
18 about Actimmune, but also the dissemination of the misinformation in the Press Release to
19 pharmacies that sold Actimmune to patients and doctors.

20 2. Whether construing § 1128(a)(3) as mandating exclusion would result in
21 violations of Dr. Harkonen’s constitutional rights.

22 Dr. Harkonen argues that upholding the Secretary’s decision would result in a
23 violation of his rights under the Fifth and Eighth Amendments to the United States
24 Constitution.

25 a. Double jeopardy

26 Dr. Harkonen contends that exclusion constitutes double jeopardy in violation of the
27 Fifth Amendment’s Double Jeopardy Clause, because even though the mandatory
28 exclusion resembles a civil penalty, it effectively constitutes a criminal penalty, and

1 therefore amounts to a double punishment.

2 The Double Jeopardy Clause, which provides that no “person [shall] be subject for
3 the same offence to be twice put in jeopardy of life or limb,” is violated when multiple
4 punishments are imposed for the same offense. Schiro v. Farley, 510 U.S. 222, 229
5 (1994). Thus, it may be violated when a defendant, punished in a criminal prosecution, is
6 penalized by a subsequent punitive civil sanction. Hudson v. United States, 522 U.S. 93,
7 98-99 (1997). However, it protects only against the imposition of multiple criminal
8 punishments for the same offense. Id. at 99.

9 In determining whether a penalty is criminal or civil, the court must first ask whether
10 the legislature, in establishing the penalizing mechanism, indicated either expressly or
11 impliedly a preference for one label or the other. United States v. Reveles, 660 F.3d 1138,
12 1140 (9th Cir. 2011) (citing Rivera v. Pugh, 194 F.3d 1064, 1068 (9th Cir. 1999)); see also
13 Hudson, 522 U.S. at 99. Even where the legislature has indicated an intention to establish
14 a civil penalty, the court inquires further whether the statutory scheme is so punitive either
15 in purpose or effect as to transform what was clearly intended as a civil remedy into a
16 criminal penalty. Reveles, 660 F.3d at 1140.

17 To determine whether a remedy denominated “civil” is actually a punitive criminal
18 penalty subject to the prohibition of double jeopardy, a court may consider whether the
19 sanction (1) involves an affirmative disability or restraint; (2) has historically been regarded
20 as punishment; (3) requires a finding of scienter; (4) will promote retribution and
21 deterrence; (5) applies to behavior that is already a crime; (6) can have an alternative
22 purpose; and (7) appears excessive in relation to the alternative purpose. Id.; see also
23 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

24 These factors, which “provide useful guideposts,” Hudson, 522 U.S. at 99, should be
25 considered “in relation to the statute on its face, and only the clearest proof will suffice to
26 override legislative intent and transform what has been denominated a civil remedy into a
27 criminal penalty.” Reveles, 660 F.3d at 1143 (citations and quotations omitted). “With this
28 very high burden, even a showing that most of the relevant factors weigh in favor of

1 considering a punishment criminal in nature may be insufficient to transform it into a
2 criminal punishment.” Id. In particular, “no one factor should be considered controlling.”
3 Hudson, 522 U.S. at 101.

4 The court finds that the Double Jeopardy Clause does not preclude application of
5 the exclusion. Section 1128(a)’s statutory scheme is not so punitive in purpose or effect so
6 as to transform what was clearly intended as a civil remedy into a criminal penalty.

7 First, the exclusion does not involve confinement or another form of restraint. While
8 it does preclude individuals and entities from participating in Federal health care programs,
9 it does not impose any physical restraint. Second, there is no indication one way or
10 another as to whether exclusion has historically been regarded as a punishment. Third,
11 while scienter is certainly an element of the convictions that trigger the exclusion, exclusion
12 does not require a finding of scienter, as exclusion may be imposed regardless of the
13 convicted individual’s state of mind.

14 Fourth, as for whether operation of the exclusion promotes deterrence and
15 retribution, there appears to be an element of deterrence in the penalty, but the court finds
16 no indication that its purpose is retribution. Moreover, it is undisputed that deterrence can
17 be a legitimate aim of any civil sanction without transforming it into a criminal sanction. See
18 id. at 102. Fifth, while exclusion is triggered by a conviction for certain felonies, and can in
19 that sense be said to apply to behavior that is already a crime, the offenses listed in the
20 statute also can form the basis of civil actions – fraud, various forms of theft, financial
21 misconduct.

22 Sixth, the exclusion clearly serves an alternative purpose, and it does not appear
23 excessive when compared to that purpose. The legislative history of the five-year
24 minimum mandatory exclusion period in § 1128(a) establishes that the sanction is civil and
25 remedial. The Senate Finance Committee report indicates that the purpose of the
26 Medicare and Medicaid Patient and Program Protection Act is to “improve the ability of the
27 Secretary and the Inspector General of [HHS] to protect Medicare, Medicaid, [and other
28 social services programs] from fraud and abuse,” and also to “protect the beneficiaries of

1 those programs from incompetent practitioners and from inappropriate or inadequate care.”
2 S. Rep. No. 109, 100th Cong., 1st Sess., at 1-2 (1987), reprinted in 1987 U.S.C.C.A.N.
3 682.

4 In addition, the Committee report states that the law “should provide a clear and
5 strong deterrent against the commission of criminal acts.” Id. at 5, 1987 U.S.C.C.A.N. at
6 686. While the desire to provide a deterrent may also be a punitive goal, the legislative
7 history demonstrates that the primary goal of the legislation is to protect present and future
8 Medicare beneficiaries from the abusers of these programs.

9 Therefore, given that the legislative intent of the exclusionary period is to protect the
10 public, the court finds that the sanction should be viewed as civil and remedial, not punitive.
11 See Manocchio v. Kusserow, 961 F.2d 1539, 1543 (11th Cir. 1992) (exclusionary period
12 provided by § 1128(a) is remedial, not punitive).

13 The Double Jeopardy Clause protects only against the imposition of multiple criminal
14 punishments for the same offense, and does not prohibit the imposition of additional
15 sanctions that could, in common parlance, be considered “punishment.” See Hudson, 522
16 U.S. at 98-99. On balance, the court finds that the Kennedy factors overwhelmingly favor a
17 finding that the exclusion of Dr. Harkonen – which is remedial in purpose – cannot give rise
18 to a claim of violation of the Double Jeopardy Clause.

19 b. Excessive fines and cruel and unusual punishment

20 Dr. Harkonen argues that the exclusion is grossly disproportionate to the nature of
21 his offense, and that upholding the Secretary’s decision would result in a violation of his
22 Eighth Amendment right to be free from excessive fines and cruel and unusual punishment.
23 He contends that the five-year exclusion is excessive in comparison to his “minor” felony
24 offense, which he characterizes as providing a “misleading” interpretation of clinical data,
25 with no impact on Actimmune delivery.

26 The limitations of the Excessive Fines Clause of the Eighth Amendment to the
27 Constitution are applied only to fines “directly imposed by, and payable to, the government”
28 and only to fines constituting punishment. See, e.g., Austin v. United States, 509 U.S. 602,

1 607 (1993) (citation omitted); see also *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-65 (1989) (excessive fines clause is implicated only when a party must make “a payment to a sovereign as punishment for some offense”).

4 Here, to the extent that the exclusion can be considered a “fine” – in the sense that
 5 an individual or entity that is excluded from participation in Federal health care programs
 6 will lose money, which is not quite the same as paying money to the government as a
 7 sanction – the question is whether it is excessive.

8 Dr. Harkonen asserts that because the district court could not identify a clear
 9 “victim,” and did not grant the government’s request for a lengthy prison sentence, and
 10 because in his view his offense was “minor,” consisting of nothing more than a simple
 11 “misrepresentation” of some clinical data, and because the government was unable to
 12 prove any “actual loss,” the five-year exclusion is “excessive” and violates the Eighth
 13 Amendment.²

14 As explained above, however, exclusions imposed by the OIG are civil sanctions,
 15 designed to protect beneficiaries of Federal health care programs from “untrustworthy”
 16 providers and others involved in the delivery of health care items and services, and are
 17 thus remedial in nature rather than primarily punitive or deterrent. Thus, the exclusion is
 18 not subject to the Excessive Fines Clause. Moreover, even if the exclusion has some
 19 punitive aspect, it is not a sanction that is “grossly disproportionate” to the gravity of the
 20 underlying offense. See, e.g., United States v. Bajakajian, 524 U.S. 321, 334 (1998) (“The
 21 amount of forfeiture must bear some relationship to the gravity of the offense that it is
 22 designed to punish.”).

23 Federal courts have repeatedly held that a § 1128 exclusion is civil and remedial
 24 rather than criminal and punitive, and numerous DAB decisions have concurred. See AR
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26 ² Dr. Harkonen appears to be suggesting that there was no substantive merit to the wire
 27 fraud charge for which he was convicted. However, as set forth above, the Ninth Circuit has
 28 affirmed his conviction and sentence. Moreover, he was precluded from collaterally attacking
 the basis for the underlying conviction on either procedural or substantive grounds in the
 proceeding before the DAB. See 42 C.F.R. § 1001.2007(d); see also *Travers*, 20 F.3d at 998.

1 18 (citing Johann Fletcher Cash, DAB No. 1725, at 12, 2000 WL 710697 (H.H.S. May 23,
2 2000)); see also Manocchio, 961 F.2d at 1541-43 (legislative history of § 1128(a)
3 establishes that the sanction is civil and remedial); Greene v. Sullivan, 731 F.Supp. 838,
4 839-40 (E.D. Tenn. 1990) (same); Donna Rogers, DAB No. 2381, 2011 WL 3251326
5 (H.H.S. May 23, 2011); Douglas L. Reece D.O., DAB No. 1448, 1993 WL 719939 (H.H.S.
6 Nov. 15, 1993). The exclusion does not pose a concern under the Eighth Amendment, as it
7 is not “grossly disproportionate” to the gravity of the underlying offense. See Bajakajian,
8 524 U.S. at 324.

9 In any event, § 1128(a)(3) gives the Secretary no discretion with regard to the
10 minimum five-year period. Conviction of a felony involving fraud or other financial
11 misconduct in connection with the delivery of a health care item or service is the triggering
12 event that mandates that the Secretary impose a minimum five-year exclusion. The
13 language – “the Secretary shall exclude” – is clearly not discretionary. See 42 U.S.C.
14 § 1320a-7(a). There is no dispute here that Dr. Harkonen was convicted of wire fraud as a
15 result of his involvement in the issuance of the Press Release. Thus, because the wire
16 fraud was perpetrated in connection with the delivery of a health care item or service, the
17 Secretary is required to exclude him from participation in federal health care programs for a
18 minimum period of five years.

19 c. Due process

20 Dr. Harkonen argues further that the exclusion violates the Fifth Amendment’s
21 guarantee of due process, because there is no rational connection between the exclusion
22 and any governmental interest – i.e., his offense had no impact on federal health care
23 programs or patients, as the fraudulent statements involved only interpretation of data, not
24 the presentation of false data – and the HHS’s own sponsored-entity (the National Institute
25 of Health - “NIH”) committed a similar, though more egregious, act of “press release fraud”
26 in 2009 in connection with the release of information regarding a medication to treat HIV,
27 yet was not disciplined. He also contends that the exclusion violates his rights to
28 substantive due process, because the Secretary acted arbitrarily in excluding him but failing

1 to discipline NIH employees who issued a similarly misleading press release in connection
2 with a drug for treatment of HIV.

3 As explained above, the statute permits the Secretary no discretion in deciding
4 whether to exclude an individual or entity from participating in Federal health care
5 programs, once the requirements of § 1128(a) have been satisfied. Thus, because the
6 Secretary had no discretion to exercise, her actions cannot be viewed as arbitrary and
7 capricious.

8 The exclusion is rationally related to the government's interests in deterring fraud in
9 the delivery of health care and health care items and services, and in protecting federal
10 health care programs and their beneficiaries from individuals who have behaved in an
11 untrustworthy manner. See Friedman, 686 F.3d at 820, 824; Morgan, 694 F.3d at 538;
12 Manocchio, 961 F.2d at 1541-42. "Untrustworthiness" is not a separate element that the
13 OIG must establish in order to support an exclusion. Nevertheless, Congress has
14 reasonably determined that a felony conviction for fraud in connection with the delivery of a
15 prescription drug is sufficient grounds for the government to "refuse to deal further with" an
16 individual, Friedman, 686 F.3d at 824; AR 31 – or, in any event, for at least the statutory
17 five-year period.

18 Nor does Dr. Harkonen's exclusion constitute an arbitrary government action in
19 violation of the Fifth Amendment based on the NIH press release. As noted above,
20 § 1128(a)(3) provides no discretion for the Secretary to exert – whether fairly, or in an
21 arbitrary, capricious, or selective manner – because it mandates exclusion upon conviction
22 of a charge of fraud in connection with the delivery of a health care product or service.
23 Conversely, without an underlying conviction, the Secretary does not have the authority to
24 exclude, except in certain specific situations (which do not apply to either NIH or the press
25 release about which Dr. Harkonen complains). Since Dr. Harkonen has made no showing
26 that any of the NIH-affiliated individuals was criminally prosecuted, he cannot prevail in this
27 claim that his substantive due process rights have been violated because he was treated
28 differently than the NIH employees.

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CONCLUSION

In accordance with the foregoing, defendant's motion for summary judgment is GRANTED, and plaintiff's motion is DENIED.

IT IS SO ORDERED.

Dated: October 22, 2013



PHYLLIS J. HAMILTON
United States District Judge